

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

SHAUkat "SAL" Maredia, et al.,) 1:05-cv-00393-OWW-SMS

Plaintiffs,) FINDINGS AND RECOMMENDATIONS TO
) GRANT THE MOTION OF COUNTER-
) CLAIMANT PHILIP MORRIS USA, INC.
) FOR DEFAULT JUDGMENT (Doc. 92)

PHILIP MORRIS USA INC., et
al.,)
)

Defendants.)

PHILIP MORRIS USA INC.,

Counterc-claimant,

V.)

SHAUKAT "SAL" MAREDIA,

Counter-Defendant.)

Defendant and Counter-claimant Philip Morris USA, Inc. is proceeding with a civil action in this Court. The matter has been referred to the Magistrate Judge pursuant to 28 U.S.C. § 636(b) and Local Rules 72-302(c) (19) and 72-303. Counter-claimant has filed a motion for default judgment on the counterclaim.

I. Background

Defendant and Counter-claimant Philip Morris USA, Inc. (PM), removed this action from the Tulare County Superior Court on

1 March 24, 2005, with jurisdiction based on diversity of
2 citizenship of the parties. A motion to dismiss was granted with
3 leave to amend by order dated June 15, 2005. Amended complaints
4 were filed by Plaintiff Shaukat "Sal" Maredia (Maredia) on July
5 12, 2005, November 10, 2005, and December 7, 2005. After the
6 Court granted PM's motion to compel discovery and for sanctions
7 in March 2006, and after Maredia failed to comply with the
8 Court's order granting the motions, PM moved for discovery
9 terminating sanctions on May 31, 2006. On July 17, 2006, the
10 Court granted the motion in part and denied it in part, finding
11 that Maredia had willfully disobeyed the Court's order and his
12 discovery obligations (Order at 7), ordering that Maredia's
13 claims against PM be dismissed, denying without prejudice the
14 request to order that Maredia's answer to the counter-claim be
15 stricken because Maredia had not been clearly warned that default
16 judgment against him might be entered (id. at 8-9), and denying
17 the request for entry of default against Maredia without
18 prejudice (id. p. 9). Judgment was entered in favor of Defendant
19 and against Plaintiff on October 12, 2006.

20 The counter-claim before the Court was filed by PM on August
21 12, 2005, and Maredia's answer Maredia was filed on September 14,
22 2005.

23 On October 30, 2006, PM moved to strike Maredia's answer to
24 the counter-claim and to enter default and default judgment on
25 the counter-claim. Minutes for the hearing date of December 4,
26 2006, reflect that the motion for default judgment was granted,
27 and counsel was to prepare and submit a proposed default judgment
28 to the Court and notice a prove-up hearing to establish the

1 amount of damages. On January 22, 2007, the Court ordered that
2 the default of Maredia on PM's counter-claim was thereby entered,
3 and all dates were vacated. The order was served on Maredia on
4 January 25, 2007.

5 The instant motion was filed on July 19, 2007, including the
6 motion, a memorandum in support, and declarations of Leopoldo J.
7 Chanco and Gerald Henry Schepker, IV, with attachments. The
8 docket reflects a declaration establishing proof of service of
9 the moving papers by mail on July 19, 2007, on Maredia at the
10 address listed in the docket. PM filed a supplemental memorandum
11 in support of the motion and a certificate of service thereof on
12 August 13, 2007.

13 No opposition or other appearance or response of any sort
14 was filed by Maredia.

15 On August 16, 2007, PM filed a reply noting that pursuant to
16 Local Rule 78-230(c), the absence of any opposition from Maredia
17 prevented Maredia from being heard in opposition to the motion.
18 Counsel for PM represented to the Court that Maredia still had
19 not complied with either this Court's previous discovery order or
20 his discovery obligations. (Reply p. 2.)

21 Counter-claimant's motion for default judgment came on
22 regularly for hearing on August 24, 2007, in Courtroom 7 before
23 the Honorable Sandra M. Snyder, United States Magistrate Judge.
24 Turner Anderson Broughton and Leopoldo J. Chanco appeared
25 telephonically on behalf of Counter-claimant Philip Morris, USA,
26 Inc. There was no appearance by the Counter-defendant Shaukat Sal
27 Maredia. Counsel for PM represented to the Court that they had
28 not had any contact from Maredia since earlier in the action when

1 Maredia had counsel. The matter was argued and submitted to the
2 Court.

3 II. Default Judgment

4 A court has the discretion to enter a default judgment
5 against one who is not an infant, incompetent, or member of the
6 armed services where the claim is for an amount that is not
7 certain on the face of the claim and where 1) the defendant has
8 been served with the claim; 2) the defendant's default has been
9 entered for failure to appear; 3) if the defendant has appeared
10 in the action, the defendant has been served with written notice
11 of the application for judgment at least three days before the
12 hearing on the application; and 4) the court has undertaken any
13 necessary and proper investigation or hearing in order to enter
14 judgment or carry it into effect. Fed. R. Civ. P. 55(b); Alan
15 Neuman Productions, Inc. v. Albright, 862 F.2d 1388, 1392 (9th
16 Cir. 1988). Factors that may be considered by courts in
17 exercising discretion as to the entry or setting aside of a
18 default judgment include the nature and extent of the delay,
19 Draper v. Coombs, 792 F.2d 915, 924-925 (9th Cir. 1986); the
20 possibility of prejudice to the plaintiff, Eitel v. McCool, 782
21 F.2d 1470, 1471-72 (9th Cir.1986); the merits of plaintiff's
22 substantive claim, id.; the sufficiency of the allegations in the
23 complaint to support judgment, Alan Neuman Productions, Inc., 862
24 F.2d at 1392; the amount in controversy, Eitel v. McCool, 782
25 F.2d at 1471-1472; the possibility of a dispute concerning
26 material facts, id.; whether the default was due to excusable
27 neglect, id.; and the strong policy underlying the Federal Rules
28 of Civil Procedure that favors decisions on the merits, id.

1 III. Notice, Status of the Parties, Default

2 Review of the docket reflects that Maredia, through his
3 counsel, answered the counter-claim on September 14, 2005; thus,
4 Maredia received notice of the action.¹

5 As previously noted, the notice of motion and motion for
6 default judgment were served on Maredia, who had appeared in the
7 action.

8 The counter-claim reflects that PM expressly sought judgment
9 against Maredia in an amount in excess of \$150,00.00, consisting
10 of compensatory damages, according to proof, as well as
11 prejudgment interest, costs, expenses, and attorney's fees
12 incurred in investigating Maredia's breach of contract claim and
13 in prosecuting the counter-claim. (Ctr-cls. pp. 5-6.) Therefore,
14 Maredia received notice from the face of the counterclaim of the
15 sum sought by PM here, namely, \$150,000.00. The notice was also
16 adequate pursuant to Fed. R. Civ. P. 55(d) and 54(c), which
17 require that a judgment by default shall not be different in kind
18 from or exceed in amount that prayed for in the demand for
19 judgment. Plaintiff expressly sought in the counter-claim the
20 amount and types of relief sought by the instant application for
21 default judgment.

22 Finally, the Court implicitly granted the motion to strike
23 Maredia's answer when it ordered that the default of Maredia be
24 entered on January 22, 2007. Thus, the case is in a proper

25
26 ¹ The Court notes that pursuant to counsel's motion, counsel for Maredia was permitted to withdraw on
27 March 2, 2006, and Plaintiff's pro se status was noted in the docket; Plaintiff was also informed that he was expected
28 to comply with all the requirements and deadlines of the Court's scheduling order, and that a failure to comply with
an order of the Court might result in a recommendation that the action be dismissed, or other sanctions. The docket
reflects that the Court's order was served by mail on Maredia.

1 procedural posture for the entry of default judgment.

2 The Court notes that in the present case, Counter-claimant
3 has not filed with the Court an affidavit stating whether or not
4 the Counter-defendant is in military service and showing the
5 necessary facts to support the affidavit, or claiming an
6 inability to determine if the Counter-defendant is in military
7 service. See, 50 App. § 521(b). However, the Servicemembers Civil
8 Relief Act (50 App. § 501 et seq.) expressly states that the
9 section concerning default judgments applies to "any civil action
10 or proceeding in which the defendant does not make an
11 appearance." 50 App. § 521(a). Here, the Counter-defendant has
12 appeared. Thus, under the plain terms of the statute, the
13 Servicemembers Civil Relief Act does not apply. Therefore, the
14 omission of an affidavit concerning Maredia's status should not
15 preclude the entry of default judgment.

16 IV. Legal Sufficiency of the Counter-claim

17 A default judgment generally bars the defaulting party from
18 disputing the facts alleged in the complaint, but the defaulting
19 party may argue that the facts as alleged do not state a claim.
20 Alan Neuman Productions, Inc. v. Albright, 862 F.2d 1388, 1392.
21 Thus, well pleaded factual allegations, except as to damages, are
22 taken as true; however, necessary facts not contained in the
23 pleadings, and claims which are legally insufficient, are not
24 established by default. Cripps v. Life Ins. Co. of North America,
25 980 F.2d 1261, 1267 (9th Cir. 1992); TeleVideo Systems, Inc. v.
26 Heidenthal, 826 F.2d 915, 917 (9th Cir. 1987).

27 In a diversity case, the substantive law applied by the
28 federal court is generally state law, and the federal courts

1 generally must follow the conflict of laws rules prevailing in
2 the states in which they sit. Klaxon Co. v. Stentor Electric Mfg.
3 Co., 313 U.S. 487, 496-97 (1941). If state law governs a
4 particular issue in a diversity case, the court must then
5 determine the content of the applicable state law; the decision
6 of the state's highest court is generally the definitive
7 statement of the state's law. Commissioner v. Estate of Bosch,
8 387 U.S. 456, 465 (1967). Absent a contractual provision
9 governing choice of law or a litigant's invocation of the law of
10 a foreign state, under California choice-of-law rules, the Court
11 presumes that California law applies unless there exists a
12 compelling reason to displace state law with the law of a foreign
13 jurisdiction. Hurtado v. Superior Court, 11 Cal.3d 574, 581
14 (1974); Shanghai Automation Instrument Co. v. Kuei, 194 F.Supp.2d
15 995 (N.D.Cal. 2001).

16 Here, no contractual provision governing choice of law has
17 been brought to the attention of the Court, and no party has
18 invoked in connection with this motion the law of any other
19 state. Here, the sales in question occurred within California.
20 There is no basis for application of the law of another state.

21 Counter-claimant cites to California law concerning the law
22 of contracts.

23 "A contract is an agreement to do or not to do a certain
24 thing." Cal. Civ. Code § 1549. "It is essential to the existence
25 of a contract that there should be: 1) Parties capable of
26 contracting; 2) Their consent; 3) A lawful object; and 4) A
27 sufficient cause or consideration." Cal. Civ. Code § 1550. The
28 elements of a claim for breach of contract are the existence of a

1 contract, Plaintiff's performance thereof, Defendant's breach,
2 and damages resulting therefrom. Acoustics, Inc. v. Trepte
3 Construction Co., 14 Cal.App.3d 887, 913 (1971).

4 Review of the counter-claim (Decl. of Chanco, Ex. B) reveals
5 that it gave notice that pursuant to a retail leaders agreement
6 executed in February 2001, Maredia was required to adhere to the
7 terms of the agreement in order to receive \$.25 for every carton
8 of PM USA cigarettes that Maredia or his business entity sold in
9 a face-to-face transaction to an adult consumer. The agreement
10 was revised in September 2001 to provide for \$.75 per carton and
11 again in January 2002 to provide for a payment of \$.90 per
12 carton. With respect to PM USA price promotions, Plaintiff was
13 required to participate in them and to execute retailer
14 understanding forms (RUF's), which contained further terms
15 governing PM's making of merchandising payments. (Ctr-clm. at 2-
16 4.) Maredia expressly agreed to be bound by the terms of the
17 agreements and RUF's. The RUF's expressly provided that PM would
18 not pay Maredia an allowance for products sold to other retail,
19 wholesale, or trade accounts; any sale that exceeded five
20 cartons; and products that were not sold to an adult consumer in
21 a face-to-face transaction (i.e., mail order and internet sales
22 were not qualified sales). Maredia also agreed to indemnify and
23 hold harmless PM from all claims, liabilities, and expenses and
24 costs, including attorney's fees, that arose from or might be
25 attributable to any error, omission, or fault of Maredia. (Ctr-
26 clm. at 4.)

27 It was alleged upon information and belief that in 2001 and
28 2002, Maredia submitted and received payment for cigarettes that

1 were not sold to an adult consumer in a face-to-face transaction,
2 payment for sales that exceeded five cartons, and submitted
3 noncomplying requests for payments while falsely representing to
4 PM that all payments he sought were for cigarette sales that
5 complied with the express terms of the agreements. (Id. at 4-5.)

6 PM sued for breach of contract that occurred when Maredia
7 sought payments under the agreements and RUF's that did not
8 comply with the terms and conditions and thereby breached the
9 retail leaders agreements and RUF's. PM alleged that it relied on
10 Maredia's misrepresentations and paid Maredia in excess of
11 \$150,000.00 to which he was not entitled; PM suffered damages in
12 that amount because of the breach of the parties' agreements.
13 (Id. p. 5.)

14 The counter-claim sufficiently alleges the existence of a
15 contract, a lawful object, Counter-claimant's performance of the
16 contract, Maredia's breach of the contract, and the suffering by
17 Counter-claimant of some damages from the breach.

18 V. Damages

19 Generally, the scope of proceedings on an application for
20 default judgment involves a determination of damages, which
21 Plaintiff must prove by evidence, whether by affidavits where an
22 evidentiary hearing is waived, Davis v. Fendler, 650 F.2d 1154,
23 1161-62 (9th Cr. 1981), or by other evidence, Fed. R. Civ. P.
24 55(b) (2). Fed. R. Civ. P. 55(b) (2) provides in pertinent part:

25 If, in order to enable the court to enter judgment or to
26 carry it into effect, it is necessary to take
27 an account or to determine the amount of damages or
28 to establish the truth of any averment by evidence or
to make an investigation of any other matter, the court
may conduct such hearing or order such references as it
deems necessary and proper and shall accord a right of

1 trial by jury to the parties when and as required by
2 any statute of the United States.

3 Cal. Civ. Code § 3300 provides that for the breach of an
4 obligation arising from contract, the measure of damages, except
5 where otherwise expressly provided by the code, is the amount
6 which will compensate the party aggrieved for all the detriment
7 proximately caused thereby, or which, in the ordinary course of
8 things, would be likely to result therefrom. Further, equitable
9 principles provide that where consistent with public policy, the
10 remedy of restitution of benefits is available to recoup an
11 advantage unjustly received, retained, or appropriated. Dunkin v.
12 Boskey, 82 Cal.App.4th 171, 195 (2000).

13 The amount of damages must be shown with reasonable
14 certainty. Steelduct Co. v. Henger-Seltzer Co., 26 Cal.2d 634,
15 651 (1945). Where the promisor by a wilful breach of contract has
16 given rise to a difficulty in proof of damages, it is proper to
17 require of the promisee only that he show the amount of damages
18 with reasonable certainty, to resolve uncertainties against the
19 promisor, and to permit the promisee to furnish a reasonable
20 basis for estimating the amount of damages that constitutes the
21 best and most convincing evidence of damages under the
22 circumstances. Id.

23 PM offers the declaration of Gerald Henry Schepker, IV, as a
24 demonstration of how PM arrived at the \$150,000.00 figure of
25 compensatory damages. Schepker, who holds a bachelor of science
26 degree in accounting and has been a certified public accountant
27 since 1994, is the director of payment integrity in the finance
28 department at PM; he also worked for PM as a regional finance

1 director from 2000 through 2002, a period coinciding roughly with
2 the interval in 2001 and 2002 during which in the counter-claim
3 it is alleged that Maredia engaged in sales covered by the
4 agreements. In that capacity he worked to identify entities that
5 were reporting false or erroneous sales of PM products in an
6 effort to obtain payments to which they were not entitled under
7 various promotional programs. Schepker does not claim to have
8 personal knowledge stemming from his own observation of any of
9 Maredia's sales conduct during that time. As director of payment
10 integrity since August 2002, Schepker has been responsible for
11 ensuring that the retailers participating in PM's promotional
12 programs earned the payments that they received; his job involves
13 analyzing purchase and sale documentation that PM receives from
14 its wholesalers, who are required to report to PM, as well as
15 reviewing documentation received from participating retailers.

16 (Decl. ¶¶ 1, 4-5.)

17 Schepker details the retail leaders agreements entered into
18 by Defendant in February 2001, September 2001, and January 2002,
19 and RUF's executed by Defendant during eight specific promotional
20 periods during the life of the agreements. (Decl. ¶¶ 8-12.)
21 Maredia expressly stated that he understood that payment would be
22 made only for products sold in accordance with the terms of the
23 RUF's. (Decl. ¶ 17, Ex. B.) The RUF's provided that PM would not
24 pay promotional allowances for cigarettes that were not sold to
25 an adult consumer in a face-to-face transaction or that were sold
26 in transactions that exceeded five cartons. (Decl. ¶¶ 12-13, Ex.
27 B.) Maredia also promised in each RUF that in order to receive
28 the promotional allowances, he would maintain accurate records

1 documenting the number of packs and cartons sold in the store to
2 adult smokers at the reduced prices during the periods and, upon
3 request, to submit such records to PM. PM reserved the right to
4 audit compliance at any time, to obtain upon request the
5 documentation that the retailer was required to maintain, and to
6 withhold payment for any noncompliance. (Decl. ¶ 17, Ex. B.)

7 Retailers such as Maredia received payments based on their
8 own reporting of their sales volume by completing a payment
9 worksheet on the front of each RUF documenting their qualifying
10 sales, and recording the number of cartons in inventory at the
11 commencement of a promotional period and at the end. The
12 difference between the two inventory counts, plus the number of
13 cartons of cigarettes that the retailer purchased from
14 wholesalers or other vendors, minus any unqualified sales, was
15 the basis for determining the number of cartons on which the
16 retailer was entitled to receive promotional payments. (Id. ¶
17 12.)

18 Schepker declared that in estimating damages, he referred to
19 STARS, a database maintained by a third-party vendor; PM's
20 wholesale customers reported to the third-party vendor the number
21 of PM products sold by the wholesalers to retailers; the
22 wholesalers who sold to Maredia at the relevant times were
23 required by the terms of their contracts with PM to report their
24 sales to Maredia and other retailers to the STARS database.
25 (Decl. ¶ 20.) PM used STARS to verify the number of cartons
26 purchased by Defendant from the wholesalers. It also used STARS
27 to "compare a retailer's purchasing patterns and, by extension,
28 his or her sales patterns, to that of his or her "Trade Class

1 Average," the average number of cartons of PM product sold by
2 retailers that sell the same types of goods. (Decl. ¶¶ 20-21.)
3 Maredia was in a distinct trade class of tobacco stores. (Id. ¶
4 21.) PM was able to compare a retailer's PM purchases to those of
5 other retailers in the same trade class on a local (district),
6 regional (one of five regions in the United States), and national
7 basis during the specific promotional periods. (Id. ¶¶ 22, 24.)
8 PM states that it reasonably estimated the number of PM cartons
9 sold by Maredia to adult consumers in face-to-face transactions
10 based on the STARS record of the volume of purchases by Maredia
11 of PM products, the type of products purchased and sold by
12 Maredia, and the purchase and sales patterns of other retailers
13 in Maredia's trade class.

14 A spreadsheet prepared at Schepker's direction and attached
15 to the declaration provides a breakdown of how the amount was
16 calculated. (Decl. ¶¶ 27-28.) The spreadsheet reveals
17 calculations of variances between the amount actually paid to
18 Maredia by PM, and amounts estimated to be amounts of average
19 sales in the various areas or the amount of estimated payment
20 based on STARS. Schepker states that PM analyzed Maredia's
21 Marlboro promotional payments and compared them to his district,
22 regional, and national Marlboro trade class averages. PM found
23 that Maredia's payments were grossly inflated when compared to
24 his district, regional, and national trade class averages;
25 Maredia received PM promotional payments that were \$252,203.86
26 greater than his national trade class average, \$222,563.48
27 greater than his regional trade class average, and \$152,611.35
28 greater than his district trade class average. PM has used the

1 lowest of the three trade class average numbers, which
2 constitutes the most conservative estimate of the amount of
3 damages to which PM is entitled, and exceeds the \$150,000.00
4 claimed. (¶¶ 29- 31.)

5 Schepker also declares that Maredia had already received
6 Marlboro promotional payments from PM totaling \$434,731 and yet
7 filed three suits in California state court claiming entitlement
8 to an additional \$355,516 in promotional payments, most of which
9 related to Marlboro promotions. Further, an unannounced one-day
10 in-store audit of Maredia's stores at an unspecified date in 2002
11 by unidentified members of PM's sales force who sat in the store
12 in an effort to estimate Maredia's general sales volume raised
13 serious concerns regarding Maredia's promotional payment claims,
14 causing PM to withhold promotional payments subject to Maredia's
15 providing documentation supporting his claimed sales. (Decl. ¶
16 30.) Schepker does not claim to have any personal knowledge of
17 the audit.

18 Schepker declared that before this lawsuit was initiated and
19 later during discovery, PM demanded that Maredia produce
20 documents and records to substantiate his claimed volume, but
21 Maredia declined, even though he is the only person in possession
22 of his records, and even though this Court has ordered him to
23 produce such records. (Decl. ¶ 25.) Indeed, the Court granted
24 default judgment in favor of PM on the counterclaim. Id.

25 PM states in its memorandum that promotional payments of
26 over \$600,000.00 were made to Defendant in 2001 and 2002, but the
27 portion of the declaration of Schepke cited to (Memo. p. 3, ll.
28 22-24, Decl. ¶ 18) does not state that fact. PM also cites to the

1 first amended complaint in which Maredia as Plaintiff alleged
2 that he earned in excess of \$935,112.00 in promotional payments
3 and acknowledged receiving over \$670,475.00 from PM. (Decl.
4 Chanco ¶ 3, Ex. A, attachment showing amounts paid for six
5 stores.) Thus, the amount paid is established by a judicial
6 admission on the part of Maredia.

7 With respect to the certainty, PM argues that because
8 Maredia has breached his contractual obligation to provide the
9 documentation that would establish damages with certainty, and
10 further because Maredia has consistently failed and refused to
11 perform his obligation to produce the documentation in the course
12 of discovery in this action, it is appropriate to assign to
13 Maredia the burden of proof as to damages. PM cites Shanghai
14 Automation Instrument Co. v. Kuei, 194 F.Supp.2d 995, 1004
15 (N.D.Cal. 2001), in which in connection with a conversion claim
16 in an action proceeding to default judgment, the court applied
17 California law and shifted the burden of proof from the plaintiff
18 to the tortious defendant regarding which portion of converted
19 money was converted to the use of the defendant; the burden was
20 shifted because the defendant there had sole possession of the
21 records, and the matter in question was peculiarly within the
22 knowledge or control of the defendant.

23 In its supplemental brief, PM also cites to Sanchez v.
24 Unemployment Ins. Appeals Bd., 20 Cal.3d 55, 71 (1977), where the
25 California Supreme Court shifted the normal burden of proof
26 pursuant to Cal. Evid. Code § 500 from an applicant for
27 unemployment insurance benefits to the department of unemployment
28 with respect to whether or not an applicant who had good cause

1 not to work on weekends was available for a substantial field of
2 employment. The court reasoned that the data concerning the size
3 and character of the labor market was peculiarly within the
4 knowledge and competence of the department and could not be
5 expected to be provided by the average unemployed claimant;
6 further, it would be inefficient to require such data in every
7 case. Id. In the pertinent part of a footnote, the court
8 described the factors to be considered in determining whether the
9 normal allocation of the burden of proof should be altered:

10 Moreover, "In determining whether the normal
11 allocation of the burden of proof should be altered,
12 the courts consider a number of factors: the knowledge
13 of the parties concerning the particular fact, the
14 availability of the evidence to the parties, the most
15 desirable result in terms of public policy in the
absence of proof of the particular fact, and the
probability of the existence or nonexistence of the
fact." (Cal. Law Revision Com. com. to Evid. Code, §
500, 29B West's Annot. Evid. Code (1966 ed.) p. 431.)
supra, 67 Cal.2d 733, 760; see also Garcia v.
Industrial Accident Com. (1953) 41 Cal.2d 689, 694 [263
P.2d 8].

17 20 Cal.3d at 71, n. 16.

18 PM also relies on Wolf v. Superior Court, 107 Cal.App.4th
19 25, 35-36 (2003) (approving shifting the burden in a case
20 involving an author's claim to contingent compensation from gross
21 receipts of sales of from merchandising a novel's characters,
22 where the financial records essential to the claim to
23 compensation were in the exclusive possession of the studio, and
24 noting that in such profit-sharing type cases where essential
25 records are in the exclusive control of the defendant who would
26 benefit from any incompleteness, public policy is best served by
27 shifting the burden of proof to the defendant). The Court notes
28 that fundamental fairness is a primary consideration in

1 determining whether or not to shift the burden of proof. Adams v.
2 Murakami, 54 Cal.3d 105, 119-20 (1991).

3 Here, it has been established that Maredia was required to
4 keep financial records with data that would permit the
5 computation of damages with certainty. Thus, the Court finds that
6 Maredia would have the best and sole source of knowledge
7 concerning the amount of qualifying sales. Further, to the extent
8 that any such records exist, the records are in the possession
9 and control of Maredia, and Maredia has denied PM access to the
10 records.

11 At this stage in the litigation, it would be Maredia who
12 would benefit should the Court find the proof of his sales
13 incomplete. Further, the efforts of both PM and the Court to have
14 the case determined on the merits and have been delayed and
15 obstructed. Thus, the most desirable result in terms of public
16 policy in the absence of proof of the precise amount of carton
17 sales is to place the burden on Maredia.

18 Finally, as to the probability of the existence or
19 nonexistence of the fact, the Court considers PM's demonstration
20 of the payments made to Maredia and the likelihood of a
21 substantial disparity between the actual sales of PM cartons and
22 the claimed sales. PM has demonstrated that it is more probable
23 than not that Maredia's claimed sales were grossly inflated. It
24 does not appear to be probable that Maredia was underpaid for his
25 sales.

26 Accordingly, the Court concludes that it is appropriate to
27 shift the burden of proof of the precise amount of damages to
28 Maredia.

1 The Court is mindful that PM does not seek merchandising
2 payments under the merchandising contracts executed by Maredia;
3 rather, it seeks only overpayments pursuant to the RUF's.
4 (Schepker Decl. ¶ 31.) Further, it does not seek return of all of
5 the promotional payments that it made; rather, it seeks only
6 \$150,000.00.

7 Considering the foregoing, the Court finds that PM has
8 established to the extent required that it suffered \$150,000.00
9 in damages.

10 VI. Propriety of Default Judgment

11 In the case before the Court, it does not appear that there
12 is any risk of mistake or excusable neglect on the part of anyone
13 with a potential interest in the subject matter of the instant
14 action. Further, there is no apparent likelihood of a dispute as
15 to a material fact essential to the Counter-claimant's case. No
16 just cause for delay appears. Because Maredia has appeared, it is
17 not necessary to establish that Maredia is not a member of the
18 armed services. There is no basis for concluding that Maredia is
19 an infant or incompetent. There does not appear to be any reason
20 why the general policy in favor of a decision on the merits would
21 warrant refusing to enter the requested default judgment.

22 Accordingly, the Court finds that Counter-claimant has shown
23 its entitlement to a default judgment.

24 VII. Recommendation

25 Accordingly, it IS RECOMMENDED that

26 1) The motion of Counterclaimant Philip Morris USA, Inc. for
27 default judgment in the amount of \$150,000.00 BE GRANTED; and
28 2) The Clerk BE DIRECTED to enter judgment in favor of

1 Counterclaimant Philip Morris USA, Inc., and against
2 Counterdefendant Shaukat "Sal" Maredia, for \$150,000.00 in
3 damages.

4 This report and recommendation is submitted to the United
5 States District Court Judge assigned to the case, pursuant to the
6 provisions of 28 U.S.C. § 636 (b) (1) (B) and Rule 72-304 of the
7 Local Rules of Practice for the United States District Court,
8 Eastern District of California. Within thirty (30) days after
9 being served with a copy, any party may file written objections
10 with the Court and serve a copy on all parties. Such a document
11 should be captioned "Objections to Magistrate Judge's Findings
12 and Recommendations." Replies to the objections shall be served
13 and filed within ten (10) court days (plus three days if served
14 by mail) after service of the objections. The Court will then
15 review the Magistrate Judge's ruling pursuant to 28 U.S.C. § 636
16 (b) (1) (C). The parties are advised that failure to file
17 objections within the specified time may waive the right to
18 appeal the District Court's order. Martinez v. Ylst, 951 F.2d
19 1153 (9th Cir. 1991).

20
21 IT IS SO ORDERED.

22 Dated: August 24, 2007

23 /s/ Sandra M. Snyder
24 UNITED STATES MAGISTRATE JUDGE
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